No. 90-1542

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

BARTHOLOMEW RIVIECCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant may secure dismissal of an indictment on the basis of a claim that the government made derivative use of immunized testimony before the grand jury.

2. Whether the government made any nonevidentiary use of petitioner's immunized testimony at his trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 919 F.2d 812. The memorandum and order of the district court (Pet. App. A14-A61) are reported at 723 F. Supp. 867.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1990. A petition for rehearing was denied on January 8, 1991. The petition for a writ of certiorari was filed on April 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiring to commit mail fraud, in violation of 18 U.S.C. 371; ten counts of mail fraud, in violation of 18 U.S.C. 1341; nine counts of bribery of bank officials, in violation of 18 U.S.C. 215; one count of misapplication of credit union funds, in violation of 18 U.S.C. 657; and one count of bank fraud, in violation of 18 U.S.C. 1344. He was sentenced to concurrent five-year terms of imprisonment on each count and was ordered to pay restitution. The court of appeals affirmed. Pet. App. A1-A13.

1. The evidence at trial established that, from 1981 to April 1986, petitioner participated in a fraudulent scheme to induce the HYFIN Credit Union and Chemical Bank to finance the purchase and rehabilitation of buildings, most of which were located in Brooklyn. In order to obtain loans from the credit union, petitioner bribed some of its officers by giving them shares in corporations that owned properties involved in the scheme. The loans were improper for several other reasons as well: they were unsecured; they were made to petitioner's real estate corporations in violation of a New York law barring corporations from obtaining loans from credit unions; they exceeded the credit union's lending limits; and they were completed without the necessary paperwork. After petitioner had fallen so deeply in debt that the credit union would no longer make loans to him, he applied for and received loans from Chemical Bank without disclosing that he owed millions of dollars to the credit union. Pet. App. A3-A4.

2. In April 1986, an employee of the credit union disclosed petitioner's scheme to the government, and an investigation began. State and federal agents searched petitioner's offices and the credit union pursuant to search warrants and seized numerous documents. Shortly thereafter, three of petitioner's accomplices in the scheme, two employees of the credit union and its attorney, agreed to plead guilty to various charges, to cooperate in the investigation, and to testify at subsequent proceedings. Pet. App. A4. See Gov't C.A. Br. 11.

In June 1987, petitioner's attorneys produced documents in response to subpoenas issued by a federal grand jury investigating the financial affairs of the credit union. After receiving use immunity under 18 U.S.C. 6002, petitioner testified before the grand jury on July 2, July 9, and September 10, 1987. Although the purpose of petitioner's grand jury appearance was to authenticate the documents produced in response to the grand jury subpoenas, the scope of the questioning extended beyond the authentication of records. In particular, petitioner answered questions pertaining to, among other things, the preparation of the documents, the ownership and operation of the real estate corporations, and the identity of his associates in the project, including his accountant, Ralph Strafaci. Pet. App. A4-A5.

Petitioner was not indicted by the grand jury that heard his testimony. In February 1988, a new grand jury was impanelled, and, on May 5, the second grand jury returned an indictment against petitioner. The same grand jury returned superseding indictments on July 1 and November 3, 1988. The government did not present the 1988 grand jury with any of the transcripts of petitioner's immunized testimony before the 1987 grand jury. Pet. App. A5.

3. A week before jury selection was scheduled to begin, petitioner moved to dismiss the superseding indictment on the ground that the government had made improper use of his immunized testimony before the grand jury. The court deferred consideration of the motion until after trial. After the jury had returned its guilty verdicts, the court conducted a hearing, in accordance with *Kastigar* v. *United States*, 406 U.S. 441 (1972), to determine whether the government had made any improper use of petitioner's immunized testimony before the grand jury or at trial. Based upon the record of the hearing and affidavits submitted by the prosecutor who tried the case, the court denied the motion to dismiss. Pet. App. A14-A61.

a. Petitioner conceded at the *Kastigar* hearing that "all the evidence introduced at trial, with the exception of the testimony of one witness, Ralph Strafaci, was derived from 'legitimate independent sources.'" Pet. App. A19. Petitioner argued, however, that the prosecutor learned of Strafaci from petitioner's grand jury testimony or, at a minimum, that petitioner's testimony "caused the prosecutor to 'focus' on Strafaci." *Id.* at A20. The district court rejected that contention, concluding that the evidence "clearly demonstrate[d] that Mr. Strafaci's identity, his role as [petitioner's] accountant, and his usefulness as a witness, were known to the United States Attorney prior to [petitioner's] appearance before the grand jury." *Ibid.* The court explained that an investigator on the staff of the U.S. Attorney's Office, Anthony Valenti, met Strafaci during the search of petitioner's offices and learned at that time that Strafaci was the accountant for petitioner's corporations. *Id.* at A20-A21. The court also found that "there was simply nothing in [petitioner's] testimony

before the grand jury * * * that would have caused the United States Attorney to 'focus' on Strafaci." *Id.* at A23.

Petitioner's only other claim of trial error, the court continued, was that the government had made improper use of knowledge it had gained regarding his demeanor. Pet. App. A23. The court noted that Valenti had asked a prosecutor who had examined petitioner before the 1987 grand jury how petitioner reacted to questioning; in response, the prosecutor stated that petitioner came across as a "wise guy." *Id.* at A23-A24; see *id.* at A8 n.2. (A different prosecutor tried the case.) The district court found this claim to be precluded by *United States* v. *Mariani*, 851 F.2d 595 (1988), cert. denied, 490 U.S. 1011 (1989), a case in which the Second Circuit stated that it would not "foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial." Pet. App. A24. Moreover, the court continued, petitioner "did not take the stand and any possible advantage derived from hearing about the kind of witness he would make was not put to any use." Pet. App. A24-A25.

b. The district court then turned to petitioner's contention that the government had made improper use of his immunized testimony before the grand jury. "The essence of [that] claim," the court said, was "that, even if his conviction is based on evidence that has an independent source and even if a new indictment could be obtained on the basis of the untainted trial record, the conviction must nevertheless be set aside and the present indictment must be dismissed because some of the evidence before the grand jury was tainted." Pet. App. A25. The court rejected that contention on three alternative grounds.

First, the district court noted, this Court has repeatedly held "that an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence," Pet. App. A26-A27, quoting *United States* v. *Washington*, 431 U.S. 181, 185 n.3 (1977),[1] and there was no indication that the statute authorizing grants of use immunity, 18 U.S.C. 6002, was intended to alter that principle, Pet. App. A33-A35. The district court found that petitioner was not entitled to invoke an exception to that general rule, recognized by the Second Circuit as an exercise of its "supervisory power," which requires dismissal of an indictment returned by the same grand jury before which a defendant has given immunized testimony. Pet. App. A39-A41; see *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976). Here, the district court noted, petitioner did not testify before the grand jury that indicted him. Pet. App. A41.

Second, relying on *United States* v. *Mechanik*, 475 U.S. 66 (1986), the district court found that petitioner's conviction rendered harmless any error in the proceedings before the grand jury. "Whether evidence derived from the defendant's compelled testimony here affected the grand jury's determination to indict," the court explained, "it is clear that the petit jury's subsequent verdict was based on evidence derived entirely from legitimate independent sources." Pet. App. A44. Thus, "[m]easured by the petit

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[1] The district court cited and discussed *Holt* v. *United States*, 218 U.S. 245, 248 (1910), *Lawn* v. *United States*, 355 U.S. 339 (1958), *United States* v. *Blue*, 384 U.S. 251 (1966), *Gelbard* v. *United States*, 408 U.S. 41, 60 (1972), and *United States* v. *Calandra*, 414 U.S. 338 (1974).

jury's verdict . . . any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.* at A44-A45 (quoting *Mechanik*).

Finally, the district court concluded that even if *Mechanik* left room for post-trial review of petitioner's claim, any alleged misuse of petitioner's immunized testimony could not have affected the grand jury's decision to indict. Pet. App. A53. "[T]aking at face value the allegations regarding the misuse of [petitioner's] testimony," the court explained, "all of the alleged misuse did no more than * * * authenticate documents that were otherwise authenticated by other witnesses or that a grand jury would have accepted as authentic in the absence of any suggestion to the contrary." *Ibid.* In fact, the court continued, the fact that petitioner failed "to substantiate most of his claims of misuse, combined with the compelling untainted evidence before the grand jury, has forced him to argue that the indictment must be dismissed if any tainted evidence was heard by the grand jury." *Id.* at A55-A57.[2] The district court found that Sec-

[2] The court rejected petitioner's claim that the government learned of grand jury witness Elizabeth Cataldo from his testimony, finding that the government had established "an independent untainted source for the identity of Cataldo and for the decision to call her before the grand jury." Pet. App. A56 n.11. Similarly, the court found that the grand jury that returned petitioner's indictment was not exposed to the transcript of his testimony. *Id.* at A56-A57 n.11. The "only support for [petitioner's] claim of misuse" before the grand jury, the court found, was a single answer by investigator Valenti, in testimony before the second grand jury, which suggested, incorrectly, that petitioner had produced certain documents. *Id.* at A57-A58 n.12. The court concluded, however, that it was "inconceivable that the grand jury's action would have been different if, instead of referring to [peti-

ond Circuit cases foreclosed that contention, and it concluded that "[t]he alleged misuse of [petitioner's] testimony * * * had no significant effect on the course of events." *Id.* at A60.

4. The court of appeals affirmed, addressing in turn petitioner's claims that the government had misused his immunized testimony at trial and before the grand jury. Pet. App. A1-A13.

With respect to the trial, the court of appeals upheld the district court's finding that Strafaci's testimony "was derived from independent legitimate sources." Pet. App. A7-A8. The court found that any contention that the government had made "indirect use" of petitioner's testimony—*i.e.*, "to shape and focus the questioning of witnesses and * * * to ascertain petitioner's demeanor"—was foreclosed by *United States* v. *Mariani*, *supra*. *Id.* at A8-A9. In any event, the court added, petitioner's demeanor was never in issue since he chose not to testify at trial. *Id.* at A9.

With respect to the grand jury proceedings, the court assumed, "for the sake of argument, that the Government did misuse [petitioner's] immunized testimony" before the grand jury. It concluded, however, that even in that event petitioner "would not be entitled to a dismissal of the indictment." Pet. App. A10. The court explained that "an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence" and that neither *Kastigar* nor the federal immunity statute, 18 U.S.C. 6002, "altered the effect of this rule."

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tioner] as the source of the documents, [the investigator] had simply said that he obtained them from the various corporate entities." *Id.* at A58-A59 n.12.

Pet. App. A10. Although the court recognized exceptions for cases in which an individual has been indicted by a grand jury that has heard his immunized testimony or in which the indictment rests "almost exclusively on tainted evidence," it found that neither exception applied to this case. *Id.* at A11 n.4. The court declined to reach the question whether *Mechanik* independently foreclosed petitioner's claim. *Id.* at A12-A13 n.5.

ARGUMENT

Petitioner contends that the court of appeals erred in its determinations (1) that the government's alleged misuse of petitioner's immunized grand jury testimony did not justify dismissal of the indictment and (2) that the alleged non-evidentiary use of that testimony at trial did not warrant reversal of his convictions. Although the Second Circuit's reasoning on the first issue conflicts with decisions of other courts of appeals, the conflict has no bearing on the resolution of this case. The second issue is a factual one on which the courts below were manifestly correct and which would not be decided differently by any other court of appeals. Further review is therefore not warranted.

1. Petitioner's challenge to the validity of his indictment presents only the question of what remedies are available for an alleged misuse of immunized testimony before the grand jury. Notwithstanding petitioner's attempts to cast the court's holding in more pejorative terms (*e.g.*, Pet. 1, 11), the court did not authorize prosecutors to use immunized testimony to secure an indictment. Rather, assuming for purposes of argument that such a violation has occurred, it held that dismissal of the indictment was not an available remedy under the circumstances of this case.

Although the court of appeals assumed *arguendo* that petitioner's immunized testimony was put to some use before the grand jury, petitioner's showing of impropriety was in fact extremely weak. After having had a full opportunity to develop his claims in a *Kastigar* hearing, petitioner was able to point to only three respects in which, he asserted, the government had made improper evidentiary use of his immunized testimony during the grand jury proceedings, and none of those claims withstands analysis.

First, he argued that, as a result of his testimony, the government had identified, or focused upon, accountant Strafaci. Pet. C.A. Br. 5, 8. The district court, however, found that there was "simply nothing" in petitioner's testimony that would have caused the government to focus on Strafaci. Pet. App. A7; see *id.* at A20-A23. Moreover, the record established that government investigator Valenti met Strafaci while executing a search warrant at petitioner's offices, long before petitioner testified. Far from overlooking Strafaci's significance, Valenti asked Strafaci to have a lawyer call him on Strafaci's behalf, indicating that Valenti had an investigative interest in Strafaci from the outset.

Second, petitioner argued that the government was "apparently [un]interested" in bookkeeper Cataldo until after she was identified in petitioner's testimony. Pet. C.A. Br. 7-8. Here again, the district court found that the government was aware of Cataldo's identity from another source before petitioner testified; that Cataldo was never viewed as a potential prosecution witness; and that, when Cataldo was called to testify before the grand jury that indicted petitioner, she merely authenticated

documents that, with one exception, had been authenticated by other witnesses.[3]

Third, petitioner complained that, in testimony before the grand jury that returned the indictment, Valenti identified petitioner as the source of certain records relevant to the case.[4] The district court acknowledged that Valenti's testimony inaccurately characterized petitioner as the source of the documents and was improper under *Braswell* v. *United States*, 487 U.S. 99 (1988). Pet. App. A57-A59 n.12. But the district court found that "it is inconceivable that the grand jury's action would have been any different if, instead of referring to the defendant as the source of the documents, [the investigator] had simply said he obtained them from various corporate entities." *Id.* at A58-A59 n.12.

On these findings, the district court set forth three reasons why petitioner was not entitled to dismissal of the indictment. It held, in the alternative, (1) that an indictment returned by a grand jury before which an immunized defendant has not testified is not subject to challenge on the ground that it rested in part on incompetent evidence, (2) that petitioner's conviction rendered any error in the grand jury harm-

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[3] Pet. App. A56 n.11. At trial, other witnesses authenticated all of the documents Cataldo had identified. *Ibid.*

[4] Pet. C.A. Br. 13-14. Referring to false net worth statements that petitioner submitted to Chemical Bank, the prosecutor elicited the following testimony (*id.* at 14):

> [Q]: And have you examined then [*sic*] in light of the documents and papers you retrieved either from [petitioner] personally as a result of Grand Jury subpoena, or other means, and the documents that were seized with search warrants at the Hyfin Credit Union?
>
> [A]: Yes, I have.

less, and (3) that there was abundant evidence, untainted by his immunized testimony, to support the indictment.

The court of appeals chose to rest its decision exclusively on the first ground. Accord *United States* v. *Society of Independent Gasoline Marketers*, 624 F.2d 461, 473-474 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981). This Court's decisions fully support that disposition. As both of the courts below noted, this Court has established that an otherwise valid indictment "is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence." *United States* v. *Washington*, 431 U.S. at 185 n.3. Accord *United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Blue*, 384 U.S. 251 (1966); *Lawn* v. *United States*, 355 U.S. 339 (1958). *Lawn* is particularly instructive. In that case, the defendants argued that the Due Process Clause entitled them to a hearing to determine whether an indictment had been based on documents that they had been compelled to produce in violation of their privilege against compelled self-incrimination. This Court upheld the trial court's refusal to hold such a hearing, explaining that the defendants had not established a foundation for a hearing and that "an indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits." 355 U.S. at 349.

It is true, as petitioner indicates, that other courts have held that an indictment is subject to dismissal if the government fails to establish an independent source for evidence submitted to the grand jury. *United States* v. *North*, 910 F.2d 843, 868-873, on rehearing, 920 F.2d 940, 947-949 (D.C. Cir. 1990),

cert. denied, No. 90-1337 (May 28, 1991); *United States* v. *Palumbo*, 897 F.2d 245, 251 (7th Cir. 1990); *United States* v. *Garrett*, 797 F.2d 656, 659-665 (8th Cir. 1986); *United States* v. *Beery*, 678 F.2d 856, 859-860, 863 (10th Cir. 1982); *United States* v. *Hampton*, 775 F.2d 1479, 1485 & n.34, 1489 (11th Cir. 1985); *United States* v. *Gregory*, 730 F.2d 692, 697-698 (11th Cir. 1984). See also *United States* v. *Zielezinski*, 740 F.2d 727 (9th Cir. 1984). Those courts have read *Calandra*, *Lawn*, and other similar cases only to foreclose inquiry into whether the grand jury was exposed to evidence that was previously obtained in violation of the defendant's constitutional rights; they have viewed reliance on a defendant's immunized testimony in a grand jury investigation as a violation that occurs in the grand jury itself. *E.g.*, *United States* v. *North*, 910 F.2d at 868-869; *United States* v. *Garrett*, 797 F.2d at 660-662; *United States* v. *Beery*, 678 F.2d at 859-860.

This distinction is elusive at best, and in any event, it is inapplicable to this case. This is not a case in which the grand jury that returned the indictment violated petitioner's rights by compelling him to testify and then relying on that testimony in its charging decision.[5] Rather, petitioner claims that the grand jury that returned his indictment was affected by the derivative use of immunized testimony that was given before a different grand jury. There is no difference in principle between that claim and an argument that a grand jury has relied on a coerced confession (or evidence derived from it) in return-

[5] The court of appeals acknowledged that its prior cases require dismissal of an indictment in that situation. See, *e.g.*, *United States* v. *Hinton*, *supra*.

ing an indictment. Both should be equally vulnerable to the principle that an otherwise valid indictment is not subject to challenge on the ground that it was based on evidence obtained in violation of a defendant's constitutional rights.

In any event, the facts of this case do not require resolution of this issue. In accordance with *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255-256 (1988), any claim that the government has made improper use of immunized testimony in securing an indictment is, at a minimum, subject to harmless error analysis. *United States* v. *North*, 910 F.2d at 873; *United States* v. *Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States* v. *Hampton*, 775 F.2d at 1489 n.51; *United States* v. *Byrd*, 765 F.2d 1524, 1529 n.8 (11th Cir. 1985); *United States* v. *Gregory*, 730 F.2d at 698; *United States* v. *Beery*, 678 F.2d at 863. After careful analysis of the particulars of petitioner's claims, the district court found that the "only support" for his contention was a single answer by a government investigator, incorrectly identifying petitioner as the source of documents produced in response to subpoena. That answer, the court concluded, could not conceivably have affected the grand jury's charging decision. Pet. App. A57-A59 n.12. The government's "overwhelming and untainted evidence at trial" established that "the United States Attorney would have been able to provide ample evidence to warrant an indictment" even without petitioner's testimony. *Id.* at A60. The facts of this case therefore do not call for review of the question whether a prejudicial misuse of immunized testimony may justify dismissal of an indictment.[6]

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[6] This Court declined to review this question in *United States* v. *North*, No. 90-1337 (May 28, 1991).

2. Petitioner also contends (Pet. 27-29) that the court of appeals erred in its disposition of his claim that the government made indirect use of his immunized testimony at trial. The district court and the court of appeals correctly rejected that claim on these facts.

The district court noted that, as far as the trial was concerned, petitioner's only claim of nonevidentiary use was that the government had capitalized on what it learned of his demeanor during his grand jury appearances. Pet. App. A23. Valenti admitted that he asked one of the prosecutors who examined petitioner how petitioner answered questions, and was told that petitioner came across as a "wise guy." *Id.* at A8 n.2, A23-A25. The government could not possibly have made any use of that observation at trial, however, since petitioner did not testify. *Id.* at A23-A25.

The facts also contradict petitioner's unelaborated assertion that his immunized testimony was used at trial "to shape and focus the questioning of witnesses and in otherwise preparing for trial." Pet. 27. See Pet. C.A. Br. 17. The court of appeals sustained the district court's finding that none of the evidence introduced during the trial was derived from petitioner's testimony. Pet. App. A6-A8. The prosecutor who tried the case did not examine petitioner before the grand jury. Furthermore, in affidavits submitted in connection with the *Kastigar* hearing, the trial prosecutor stated that although he read one volume of petitioner's testimony and glanced at another, he did not look at the volume containing the most substantial portion of petitioner's testimony; that the volumes he did examine involved primarily the authentication of documents; and that, by the time he prepared for trial, he recalled only that petitioner

authenticated documents in the grand jury. Gov't C.A. Br. 12-13. It is impossible to conceive how the prosecutor's recollection that petitioner had authenticated documents could have assisted him in focusing and shaping evidence that was derived entirely from legitimate sources.[7]

The cases on which petitioner relies, *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), and *United States* v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983), involved far more substantial claims of nonevidentiary use. In *McDaniel*, the prosecutor read transcripts of immunized grand jury testimony in which the defendant "fully confessed his misdeeds." 482 F.2d at 311. Moreover, at the time he read the transcripts, the prosecutor was unaware that the testimony had been obtained pursuant to a grant of

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[7] Petitioner does not seek review of the contention, which he advanced in the court of appeals, that the government made improper nonevidentiary use of his testimony before the grand jury. See Pet. i. In any event, the record establishes that, a year before petitioner testified before the grand jury, three of his accomplices in the scheme to defraud the credit union agreed to plead guilty and cooperate with the government. All three were fully debriefed before petitioner gave his immunized testimony. Petitioner was not indicted by the grand jury that heard his testimony, nor was that testimony presented to the grand jury which returned the indictment. Gov't C.A. Br. 10-13; Pet. App. A56-A57 n.11. Further, the district court rejected all of petitioner's claims of derivative use before the grand jury (except for the investigator's reference to petitioner as the source of corporate documents, which the court determined to be harmless), and it concluded that there was abundant evidence to sustain the indictment. Pet. App. A55-A61 & nn.11-12. Under the standard applied in *Bank of Nova Scotia*, those facts leave no room for a determination that any nonevidentiary use of petitioner's testimony during the proceedings culminating in his indictment had any effect on the charging decision.

immunity, and therefore "could have perceived no reason to segregate [the] testimony from his other sources of information." *Ibid.* The court concluded that, "[u]nder these circumstances," the government could not satisfy its burden of showing that the testimony was not used "in some significant way short of introducing tainted evidence," such as in "planning cross-examination, and otherwise generally planning trial strategy." *Ibid.* Similarly, in *Semkiw*, the court of appeals remanded the case to the district court for a hearing into the possibility that the trial prosecutor had discovered the defendant's defense through his access to the defendant's immunized testimony, and thus had derived an unfair advantage in preparing his case. 712 F.2d at 893-895. In the instant case, the trial prosecutor's affidavits foreclosed a similar contention.

It does not appear that *McDaniel*, *Semkiw*, or any other court of appeals decision would require reversal of a conviction in a case in which the prosecution has made "merely tangential" nonevidentiary use of immunized testimony.[8] But in any event, review of that question should await a case in which there is a concrete indication that the government has

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[7] See *United States* v. *Serrano*, 870 F.2d at 17-18 ("a prosecution is not foreclosed merely because 'the immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial' "); *United States* v. *Pantone*, 634 F.2d 716 (3d Cir. 1980) (mere exposure of prosecutor to immunized testimony does not require reversal of conviction); *United States* v. *Crowson*, 828 F.2d 1427, 1431 (9th Cir. 1987) (assuming *arguendo* that nonevidentiary use was prohibited, but finding that the government carried its burden of showing that no such use was made); *United States* v. *Byrd*, 765 F.2d at 1532 (a violation of the privilege against compelled self-

made some nonevidentiary use of immunized testimony. See *United States* v. *Serrano*, 870 F.2d at 17 (declining to review untimely claim of nonevidentiary use on the ground that the record on appeal was "clearly inadequate to resolve this highly factual issue" and "contain[ed] none of the findings relevant to this fact-intensive issue"). Here, the prosecutor specifically denied any such use, and petitioner's claim consists entirely of an unelaborated assertion that the government nonetheless used his testimony to focus and shape evidence that was derived entirely from legitimate sources.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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incrimination ordinarily does not occur "unless [the] use of the immunized testimony resulted in the introduction of evidence not obtained wholly from independent sources"). The D.C. Circuit reserved judgment on whether the Fifth Amendment prohibits nonevidentiary use in *United States* v. *North*, 910 F.2d at 856-860.

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